No. 83-2090

(2)

FILED
AUG 10 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRITZ BUFORD MAYFIELD, ETC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

SANDRA D. LORD
Attorney
Department of Labor
Washington, D.C. 20210

16 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion to set aside entry of default under Fed. R. Civ. P. 55(c) and in granting the Secretary's motion for default judgment.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Consolidated Masonry & Fireproofing, Inc. v. *Wagman Construction Corp.*, 383 F.2d 249 ..... 5, 6

Gomes v. *Williams*, 420 F.2d 1364 5

Hughes v. *Holland*, 320 F.2d 781 ..... 5, 6

Jackson v. *Beech*, 636 F.2d 831 6

Keegel v. *Key West & Caribbean Trading Co.*, 627 F.2d 372 9

Marziliano v. *Heckler*, 728 F.2d 151 ..... 5, 6, 8, 9

Smith v. *Kincaid*, 249 F.2d 243 5

Stone, In re, 588 F.2d 1316 7

United Coin Meter Co. v. *Seaboard C. R.R.*, 705 F.2d 839 6

United States v. *$55,518.05 in United States Currency*, 728 F.2d 192 ..... 6, 9, 10

Page

Statutes and rule:

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*:

29 U.S.C. 203(s)(2) 8

29 U.S.C. 206 2

29 U.S.C. 207 2

29 U.S.C. 211(c) 2

29 U.S.C. 215(a)(2) 2

29 U.S.C. 215(a)(5) 2

Fed. R. Civ. P.:

Rule 55(a) 2
Rule 55(c) 5, 6
Rule 60(b) 5, 6

Miscellaneous:

Report by the Comptroller General of the U.S., *Changes Needed to Deter Violations of Fair Labor Standards Act* (May 1981) 8

C. Wright, A. Miller & M. Kane, 10 *Fed. Practice & Procedure* (2d ed. 1983) 8

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2090

FRITZ BUFORD MAYFIELD, ETC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A19) is reported at 729 F.2d 1462 (Table). The district court's findings of fact and conclusions of law (Pet. App. A1-A11) and default judgment (Pet. App. A12-A18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 1984. The petition for a writ of certiorari was filed on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owned and operated Joe's Cafe and Buford's Lakeview Motel and Restaurant in Jackson, Tennessee (Pet. App. A2). A compliance investigation conducted by the Secretary of Labor in 1981 revealed that petitioner did not pay his employees the minimum wage for all hours

worked or overtime compensation for workweeks of longer than 40 hours, and did not maintain proper records, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. 206, 207, 211(c), 215(a)(2) and (5) (Pet. App. A2-A5). Specifically, the investigation showed that petitioner had underpaid 77 employees a total of $62,426.43 between July 19, 1979 and July 18, 1981 (*id.* at A3).[1]

On March 26, 1982, the Secretary filed this action in the United States District Court for the Western District of Tennessee, seeking to enjoin petitioner from withholding back wages due employees and from committing future violations of the Act. Although petitioner was served with the complaint on March 30, 1982, he failed to answer, plead or make any other response within the time permitted by law (Pet. App. A12).

2. After almost three months had elapsed, the Secretary, on June 22, 1982, filed with the clerk of the district court, pursuant to Fed. R. Civ. P. 55(a), an application for entry of default together with a supporting sworn affidavit. The Secretary asserted that, in view of petitioner's failure to respond to the complaint within the required time, the employer should be held in default. C.A. App. 7-9. The clerk entered default on June 22, 1982 (C.A. App. 14).

On June 24, 1982, petitioner filed a "response to application for entry of default," accompanied by an affidavit from his counsel (C.A. App. 15-17). The response stated briefly that petitioner was then "without sufficient knowledge or

---

[1]A prior compliance investigation conducted in 1977 also had revealed violations by petitioner of the minimum wage, overtime compensation and record-keeping provisions of the Act. In particular, several employees were found to be due more than $5,000 in back wages. The compliance officer who conducted the investigation in 1977 explained the requirements for further compliance with the Act. Petitioner had reimbursed his employees the full amount computed to be due at that point. Pet. App. A2.

information to form a belief as to the averments contained in Plaintiff's complaint." The affidavit in support of the response reiterated the claim that petitioner was without sufficient information to answer the complaint and further stated that "within a reasonable amount of time the defendant will file an answer fully and accurately defending said complaint." The Secretary filed a counter-response in support of his application for entry of default (*id.* at 18-20).

3. On July 26, 1982, the Secretary filed a motion for judgment by default, attaching supporting affidavits and an exhibit that included payroll records and back wage computations. On August 13, 1982, the district court set August 27, 1982, as the date for a hearing at which petitioner was to show cause why a default judgment should not be entered against him. On the day of the scheduled hearing, petitioner filed a motion to set aside the entry of default and moved the court for permission to enter a defense to the Secretary's complaint on the ground that petitioner did not meet the jurisdictional minimum of annual gross volume of sales of $325,000 (C.A. App. 26-43).

At the show cause hearing, a Department of Labor compliance officer testified to the method by which he calculated back wages, and further testified that the calculations were based upon examinations of available employee records, interviews of available former and current employees, and interviews of petitioner (C.A. App. 55, 62, 68-74). The compliance officer also testified concerning the Act's coverage, stating that the annual gross volume of sales for the enterprise was determined by using monthly totals of business done by each of petitioner's establishments (*id.* at 62). The totals, furnished by petitioner's accountants, were taken from petitioner's Tennessee sales tax returns (*id.* at 62, 66-67).

Both at the outset and at the conclusion of the evidentiary hearing, the district court denied petitioner's motion to set aside the entry of default, holding that the June 24, 1982, motion was insufficient because it said nothing about excusable neglect and that the August 27, 1982, motion was inadequate because it came too late (Pet. App. A21-A22). At the close of the hearing, the court announced that, in any event, it had read petitioner's second motion and had found it insufficient to show excusable neglect (C.A. App. 79). The court concluded (*id.* at 80):

> Well, I'm prepared to say, that the hearing has convinced me that the Motion would not have been well taken anyway, but I will stand by my ruling that it was not timely filed.

On September 24, 1982, the district court entered findings of fact and conclusions of law (Pet. App. A1-A11) in which it reiterated (*id.* at A3; see also *id.* at A7) that petitioner's "Motion to Set Aside the Entry of Default filed on the date of hearing * * * was untimely and failed to show any excusable neglect for failure to answer, plead or respond within the required time." The court further found that petitioner had violated the minimum wage, overtime and recordkeeping provisions of the Act. On October 14, 1982, the court entered a default judgment against petitioner and enjoined him from committing further violations of the Act and from withholding back wages in the amount of $76,847.91, plus 12% interest (*id.* at A7, A12-A14).

4. The court of appeals affirmed, finding that "no prejudicial error intervened in the judgment and proceedings in the district court" (Pet. App. A19).

ARGUMENT

The court of appeals' decision is correct and represents nothing more than the application of settled principles to the facts of this case. Moreover, the decision below does not

conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioner contends (Pet. 8-12) that the district court should have set aside the entry of default for good cause shown pursuant to Fed. R. Civ. P. 55(c) or, alternatively, that the court should have set aside the default judgment in accordance with Fed. R. Civ. P. 60(b). It is well established, however, that the grant or denial of a motion for entry of default or for judgment by default is a matter that lies within the sound discretion of the district court. See, *e.g.*, *Marziliano* v. *Heckler*, 728 F.2d 151, 156 (2d Cir. 1984); *Gomes* v. *Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970); *Consolidated Masonry & Fireproofing, Inc.* v. *Wagman Construction Corp.*, 383 F.2d 249, 251 (4th Cir. 1967); *Hughes* v. *Holland*, 320 F.2d 781, 782 n.2 (D.C. Cir. 1963); *Smith* v. *Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957). When a district court denies relief from a default, there is no abuse of discretion unless it is evident that the court "was clearly wrong in finding that good cause had not been shown for setting aside the default." *Consolidated Masonry*, 383 F.2d at 251. See also *Marziliano*, 728 F.2d at 156. To be sure, in exercising its discretion, a court must keep in mind the preference that cases be decided on the merits, rather than by default. *Gomes*, 420 F.2d at 1366. Nevertheless, that preference must be weighed against "considerations of social goals, justice and expediency." *Ibid.* (footnote omitted). Accordingly, it is incumbent upon the defaulting party to show that there was "good reason for the default and that he has a meritorious defense to the action." *Ibid.*

As petitioner notes (Pet. 8-9), the courts consider several factors in determining whether there exists good cause for setting aside an entry of default:

> (1) [w]hether the party in default has shown a meritorious defense;
>
> (2) [h]ow promptly the defaulting party acted;

(3) whether the default was willful or the result of excusable neglect; and

(4) whether the non-defaulting party will be prejudiced by the setting aside of the default.

Application of these factors to the present case demonstrates that the district court acted well within its discretion in denying petitioner's motion to set aside the entry of default.[2]

a. First, with respect to petitioner's promptness and the wilfulness vel non of his default, as we noted above, nearly three months elapsed between the time the Secretary filed and served his complaint and his application for entry of default.

Moreover, petitioner failed to submit a timely motion to set aside the entry of default. Although there is no precise definition of what constitutes a reasonable time period in which to respond to an entry of default, a defaulting party is expected to act "with reasonable promptness" in seeking to set aside an entry of default or a default judgment. See *Consolidated Masonry*, 383 F.2d at 251 (two and a half month delay between entry of default and defaulting party's motion to set aside default held unreasonable). See also *Marziliano*, 728 F.2d at 154, 156 (presentation of defaulting party made within nine days of learning of default rejected by court); *Hughes* v. *Holland*, *supra* (motion to set aside

---

[2]The criteria for setting aside a default judgment by a Rule 60(b) motion are at least as stringent as those governing a Rule 55(c) motion to set aside entry of default. See *United States* v. *$55,518.05 in United States Currency*, 728 F.2d 192, 195 (3d Cir. 1984); *United Coin Meter Co.* v. *Seaboard C. R.R.*, 705 F.2d 839, 845 (6th Cir. 1983). As petitioner acknowledges (Pet. 9), some courts apply an even stricter standard to Rule 60(b) motions. See *Jackson* v. *Beech*, 636 F.2d 831, 835-836 (D.C. Cir. 1980). Since petitioner cannot show that he met the Rule 55(c) test, he surely cannot satisfy the Rule 60(b) standard.

default and for permission to file a defense presented less than two months after entry of default denied).

Here, petitioner's initial response to the entry of default indicated only that he intended to file an answer. Petitioner did not actually submit an answer to the Secretary's complaint, or move with supporting materials to set aside the entry of default, until the day of the evidentiary hearing on the Secretary's motion for default judgment — more than a month after the entry of default, and four months after the complaint had been filed. In these circumstances, the district court correctly concluded (Pet. App. A7) that petitioner had "failed to timely respond to the entry of default" and that his "lack of diligence," together with his failure to provide an adequate excuse for his neglect, indicated that there was no "good cause" to relieve him from the entry of default.

b. Furthermore, as the district court noted (Pet. App. A22), setting aside the default in this case could have substantially prejudiced the Secretary. A "critical" concern in this context is that the factual allegations supporting the alleged "meritorious defense" be "presented in a timely enough fashion to permit the opposing party to question the legal sufficiency of the defense." *In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978). Petitioner's defense, presented moments before the show cause hearing convened, permitted the Secretary no notice of the facts or issues relied upon by petitioner (Pet. App. A22). Thus, as the district court remarked (*ibid.*), full consideration of petitioner's motion and accompanying documents would have required a continuance of half a year in order to allow time for the Secretary to prepare his response and for the court to re-calendar the case.

In addition, setting aside the entry of default and permitting the case to go to trial could have thwarted the Secretary's ability to locate witnesses and present his case.

This is particularly true in a situation like this one, which involves allegations of record-keeping violations.[3] As of the date of the show cause hearing, the addresses of 44 of petitioner's employees already were unknown (see Pet. App. A15-A18). Had the case been delayed another six months, additional employee witnesses whose testimony could have been crucial to the Secretary's case might no longer have been available to testify. The potential for loss of evidence constitutes substantial prejudice to the Secretary. See C. Wright, A. Miller & M. Kane, 10 *Fed. Practice & Procedure* § 2699 (2d ed. 1983).

c. Petitioner's further contention (Pet. 11) that the judgment below should be reversed solely because the district court "refused to consider" his "meritorious defense" also is unavailing. As discussed above (pages 6-7, *supra*), the district court, in its discretion, was not required to entertain an eleventh-hour motion to set aside a default when full consideration of the motion would have necessitated a delay of six months and the defaulting party had failed to present any defense for a period of four months, even in response to the entry of default. Were the district court forced to adjudicate such a motion before entering a judgment of default, litigants could delay judgment almost indefinitely.

Moreover, the district court was in the best position to judge the good faith and credibility of the parties and to evaluate the possibility that petitioner had a meritorious defense in light of all the facts. *Marziliano*, 728 F.2d at 156. Petitioner asserted in his motion to set aside entry of default that he did not meet the annual sales volume test for enterprise coverage set forth in 29 U.S.C. 203(s)(2), and the court

---

[3]See Report by the Comptroller General of the United States, *Changes Needed to Deter Violations of Fair Labor Standards Act* 12 (May 1981) (detailing prejudice resulting from delay in FLSA cases).

noted at the close of the show cause hearing that it had read petitioner's motion and affidavit (C.A. App. 79-80). In considering this defense, the district court had the benefit of the Secretary's evidence that petitioner in fact met the coverage test. At the show cause hearing, the Department of Labor compliance officer testified as to the manner in which coverage had been determined, stating that the annual gross volume of sales for the enterprise was determined by using monthly totals of business receipts at each of petitioner's establishments (*id.* at 62). The totals, furnished by petitioner's accountants, were taken from petitioner's own state sales tax returns (*id.* at 62, 66-67). Based on this evidence, the district court was entitled to conclude, especially in view of the prior violations committed by petitioner (see note 1, *supra*), that justice did not require setting aside the default in order to enable petitioner belatedly to develop a defense of non-coverage.

2. Petitioner also contends (Pet. 10) that the default should be set aside because the record below does not "show any consideration" of the factors he identifies as determinative. The district court need not explicitly mention the enumerated factors, however. It is sufficient to be able to infer from the record that the court found that the appropriate criteria were met. See, *e.g.*, *Marziliano*, 728 F.2d at 156.[4]

---

[4]In *Keegel* v. *Key West & Caribbean Trading Co.*, 627 F.2d 372 (D.C. Cir. 1980), the case on which petitioner relies (Pet. 10), the court of appeals did not reverse the judgment below on the ground of inadequate findings, explicitly stating (627 F.2d at 374) that it "need not * * * decide this case on that limited basis."

The Third Circuit has at times required the district court to make specific findings as to the factors of prejudice, meritorious defense, and bad faith. See *United States* v. *$55,518.05 in United States Currency*, 728 F.2d 192, 200 (1984) (Garth, J., dissenting), and cases cited therein. Even the Third Circuit, however, does not apply this requirement

In any event, when the district court's findings and comments are viewed as a whole, it is evident that the court in fact considered each of the criteria petitioner has identified. Thus, while at the outset of the show cause hearing the court rejected petitioner's motion to set aside default as untimely and prejudicial to the Secretary (Pet. App. A22), at the close of the hearing the court remarked that it had read petitioner's affidavit and found it "insufficient to show excusable neglect" (C.A. App. 79). Furthermore, as noted above (pages 8-9, *supra*), after receiving evidence relevant to the Act's coverage of petitioner, the court stated (C.A. App. 80) that "the hearing has convinced me that the Motion would not have been well taken anyway * * *." Hence, while the district court may not have addressed each factor expressly, it is clear that it considered each of the relevant criteria. In these circumstances, the court's refusal to set aside the default cannot be deemed an abuse of discretion.

---

automatically to reverse a district court's discretionary denial of a motion to set aside default. See *United States* v. *$55,518.05 in United States Currency*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

SANDRA D. LORD
Attorney
Department of Labor

AUGUST 1984

DOJ-1984-08